Supreme Court, U. S.
FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1802

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
P. O. Box 1122
Richmond, Virginia 23208
Counsel for Petitioner

INDEX

CITATIONS

Cases

Constitutional Provisions

Statutes

IN THE

Supreme Court of the United States

October Term, 1978

No. .....

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, American Motors Sales Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 12, 1979, reversing the judgment of the United States District Court for the Eastern District of Virginia entered February 13, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 592 F.2d 219 (4th Cir. 1979). The opinion of the United States District Court for the Eastern District of Virginia is reported at 445 F. Supp. 902 (E.D. Va. 1978). The opinions are reprinted in the Appendix commencing on pages 21 and 2, respectively.[1]

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on February 12, 1979. A timely petition for rehearing *en banc* was denied on March 7, 1979 and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether Va. Code § 46.1-547(d) violates the Commerce Clause of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article I, § 8.

"The Congress shall have power . . . [t]o regulate commerce . . . among the several states. . . ."

Statutes

Va. Code § 46.1-547(d)

> It is unlawful for any manufacturer, factory branch, distributor or distributor branch, or any field represen-

[1] References to the appendix are denoted "A. ....."

tative, officer, agent or any representative whatsoever of any of them:

* * *

(d) To grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor has first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; provided, further, that a reopening of a franchise in a trade area that has not been in operation for more than one year shall be deemed the establishment of a new franchise subject to the terms of this subsection[.]

1978 Supplement to volume 7 of the Code of Virginia, 1950, at pages 187-188.

STATEMENT OF THE CASE

Petitioner, American Motors Sales Corporation ("AMSC"), a Delaware corporation with its principal place of business in Southfield, Michigan, sells AMC and Jeep motor vehicles, parts, and accessories to franchised dealers in interstate commerce throughout the United States. In 1975, AMSC notified P. D. Waugh & Co. ("Waugh"), the only Jeep dealership in the Orange, Virginia market area, that it intended to grant a Jeep franchise to Early AMC, Inc. ("Early"), a franchised AMC and Suburu dealership in Orange, Virginia, at Early's established location

about two miles from Waugh's dealership. (A. 23-24.) The Jeep franchise offered to Early would have been an "additional franchise" within the meaning of Va. Code § 46.1-547(d).

Waugh then requested the Commissioner of Motor Vehicles of the State of Virginia ("the Commissioner") to conduct a hearing pursuant to Va. Code § 46.1-547(d) to determine whether the market could support both dealerships. The hearing officer found that Waugh's sales performance had been inadequate and that no reasonable evidence showed the trade area could not support two Jeep dealers. However, the Commissioner rejected the hearing officer's conclusion and prohibited AMSC from granting Early a Jeep franchise.[2] (A. 24.)

On November 5, 1976, AMSC and Early filed a complaint in the United States District Court for the Eastern District of Virginia against the Commissioner and the Division of Motor Vehicles of the State of Virginia ("DMV") asking the Court to permanently enjoin the Commissioner and the DMV from enforcing the provisions of Va. Code § 46.1-547(d) on the ground that the statute, on its face and as applied, violates the Constitution of the United States. Specifically, AMSC and Early contended that the statute violates (1) the Supremacy Clause, (2) the Due Process and

[2] On April 27, 1978 Waugh's franchise to sell Jeep vehicles was terminated, and on June 5, 1978, Early was awarded a franchise to sell Jeeps at its established location in Orange. This does not moot the case, however, since there plainly is an immediate prospect that AMSC will desire to establish franchises in areas in Virginia which are being served by existing franchisees who will object to the establishment of the additional franchises pursuant to Va. Code § 46.1-547(d). *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 86, n.1 (1977). Thus there remains a controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941). In fact, subsequent to the decision of the Court of Appeals, AMSC has been involved in such a controversy over the establishment of an additional Jeep franchise in the Roanoke, Virginia area.

Equal Protection Clauses of the Fourteenth Amendment, and (3) the Commerce Clause. (A. 24.) Jurisdiction was founded on the existence of a federal question and an amount in controversy greater than $10,000.00.

Following the admission of Waugh and the Virginia Association of Automobile Dealers as intervenor-defendants, the case was submitted to the District Court on cross-motions for summary judgment. On February 13, 1978, the District Court declared the statute an unconstitutional burden on interstate commerce and enjoined the Commissioner and the DMV from enforcing the statute. (A. 1.)

Noting that Jeep vehicles, like most other motor vehicles, are manufactured outside Virginia and "hence are articles of interstate commerce," the District Court stated: "That the challenged statute affects interstate commerce is beyond question." 445 F. Supp. at 905. (A. 5.) The District Court recognized that the test for determining the validity of state statutes affecting interstate commerce, as enunciated by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and *A & P Tea Co.* v. *Cottrell*, 424 U.S. 366, 371-72 (1976), is:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

445 F.Supp. at 405. (A. 5.)

Applying this test to Va. Code § 46.1-547(d), the District Court concluded (1) that under the authority of *Buck* v.

Kuykendall, 267 U.S. 307 (1925), and *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525 (1949), the preservation of competition is not a legitimate local purpose under the Commerce Clause, and (2) that while the protection of dealers against unfair trade practices by manufacturers is a legitimate local purpose, the statute is unconstitutional under the rule of *A & P Tea Co.* v. *Cottrell, supra,* because the State's purpose "could be promoted as well with a lesser impact on interstate activities." 445 F.Supp. at 911. (A. 19.)

Because the resolution of plaintiff's remaining constitutional challenges to the statute were unnecessary to appropriate adjudication of the case, the District Court refrained from deciding any constitutional issues other than those raised under the Commerce Clause.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and dissolved the injunction against enforcement of Va. Code § 46.1-547(d). In support of its decision, the Court of Appeals relied primarily upon *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978), and *New Motor Vehicle Board* v. *Orrin W. Fox Co.,* ..... U.S. ....., 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978), both of which were decided after this case was decided by the District Court.[3]

The Court of Appeals, after acknowledging the test enunciated in *Pike* v. *Bruce Church* and *A & P Tea Co.* v. *Cottrell* for determining the validity of a statute challenged under the Commerce Clause, held (1) that the Virginia statute serves a legitimate local purpose, (2) that it treats

---

[3] The judgment of the District Court in the present case was entered on February 13, 1978. This Court decided *Exxon Corp* v. *Governor of Maryland* on June 14, 1978, after the briefs of the parties in the appeal of this case had been filed but before oral argument on July 18, 1978. *New Motor Vehicle* v. *Orrin W. Fox Co.* was decided by this Court on December 5, 1978.

interstate and intrastate commerce evenhandedly, and (3) that it imposes no unconstitutional burden on interstate commerce.

Because the District Court did not address the other constitutional challenges to the statute which were not briefed on appeal, the Court of Appeals, noting that AMSC and Early had reserved those challenges, remanded the case to the District Court for the consideration of those issues. By orders entered March 13, April 6, and May 29, 1979, the Court of Appeals stayed until June 5, 1979 the issuance of that part of its mandate remanding the case to the District Court for the consideration of the additional challenges, which have no effect on the issue here presented for review.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Presents A Constitutional Question Of Great Importance Which Has Not Been, But Should Be, Settled By This Court.

As this Court noted in *New Motor Vehicle Board* v. *Orrin W. Fox Co., supra,* 58 L. Ed. 2d at 370, twenty-five states have enacted legislation to protect retail car dealers from perceived abusive and oppressive acts by manufacturers, and at least seventeen other states have enacted statutes which, like Va. Code § 46.1-547(d), prescribe conditions under which new or additional dealerships may be permitted in the territory of an existing dealership. 58 L. Ed. 2d at 371, n.7. Despite the enormous economic impact of these statutes on manufacturers of motor vehicles and on motor vehicle dealers, and the impact on the consuming public, this Court has never addressed the issue whether a statute such as

Va. Code § 46.1-547(d) imposes an unconstitutional burden on interstate commerce in violation of the Commerce Clause.

In *Fox,* this Court decided that a California statute, in some ways similar to Va. Code § 46.1-547(d), did not violate procedural due process mandated by the Fourteenth Amendment and did not conflict with the Sherman Act. The decision in *Fox* was narrowly limited to those two issues. It contained no reference to or discussion of the Commerce Clause though that issue was brought to the attention of this Court by a footnote to the appellee's brief. Therefore, the question whether state statutes, similar to Va. Code § 46.1-547(d), which prescribe conditions under which new or additional automobile dealerships may be permitted in the territory of an existing dealership, unconstitutionally burden interstate commerce was not decided by this Court in *Fox* and has not been decided by this Court in any other case.

Moreover, as noted by the Court of Appeals in its opinion, some state courts have held that similar statutes violate the Commerce Clause and some state courts have held that such statutes do not violate the Commerce Clause. 592 F.2d at 221, n.2. (A.22.) Thus, there are conflicting decisions by the state courts on this important question involving the Constitution of the United States. *See, e.g., Gen. GMC Trucks, Inc.* v. *Gen. Motors Corp., Etc.,* 239 Ga. 373, 237 S.E.2d 194, 196-198, *cert. denied,* 434 U.S. 996 (1977); *cf. Tober Foreign Motors* v. *Reiter Oldsmobile,* ..... Mass. ....., 381 N.E.2d 908 (1978).

Accordingly, AMSC submits that its petition for certiorari should be granted because the decision below presents an important and complex question of constitutional law which has not been, but should be, settled by this Court.

II.

The Decision Below Is In Conflict With The Principles Established By H. P. Hood & Sons, Inc. v. Du Mond and Buck v. Kuykendall.

The Court of Appeals held that Va. Code § 46.1-547(d) is distinguishable from the statutes invalidated by this Court in *H. P. Hood & Sons, Inc.* v. *Du Mond, supra,* and *Buck* v. *Kuykendall, supra.* 592 F.2d at 223. (A. 27.) If it is not, as AMSC contends, then the decision below is directly in conflict with the principles of *Hood* and *Buck* which this Court has long applied in cases involving Commerce Clause issues.

In *Buck,* this Court struck down a Washington statute requiring each common carrier using the state's highways to obtain a certificate from the Director of Public Works declaring that "public convenience and necessity" justified the operation of the carrier. Buck, a citizen of Washington, was denied a certificate on the ground that the market was already adequately served.[4] This Court noted that the primary purpose of the statute was the prohibition of competition and that:

> It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and the same manner. . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate com-

[4] Contrary to the inference to be drawn from the decision of the Court of Appeals, 592 F.2d at 221 (A. 27.), the Washington statute in *Buck was* applied evenhandedly to carriers engaged in both interstate and intrastate commerce. In *Northern P.R. Co.* v. *Schoenfeldt,* 123 Wash. 579, 213 P. 26 (1923), a case involving the statute in issue in *Buck,* the Supreme Court of Washington stated that the statute applied to carriers engaged in interstate or intrastate commerce, and that "it applie[d] alike to each class without discrimination." 213 P. at 28.

> merce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause.

267 U.S. at 315-316.

Relying upon *Buck*, the District Court in the present case held, *inter alia*:

1. The statute determines not the manner in which automobiles may be sold but rather who may sell them.
2. The statute prohibits Early from selling Jeep vehicles while permitting Waugh to sell them "for the same purpose and in the same manner."
3. The statute is a regulation not merely of Virginia's markets but of interstate commerce itself.
4. The effect of the statute on interstate commerce is "not merely to burden but to obstruct it" because American is totally prohibited from selling Jeep vehicles through Early's present franchise.

See 445 F.Supp. at 906. (A. 7-8.)

In *H. P. Hood & Sons, Inc.* v. *Du Mond, supra,* this Court reaffirmed the principle of *Buck* v. *Kuykendall. Hood* involved a statutory scheme[5] which the District Court de-

[5] Section 258-C of Article 21 of the Agriculture and Market Law of New York, Laws of 1934, C. 126 provided in part:

> No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a new existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the Commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. 336 U.S. at 527-28, n.3.

scribed in the present case as "almost identical in effect" to the legislation challenged herein. In that case, a Massachusetts milk distributor, which had two milk receiving depots in eastern New York for the purchase of locally produced milk for shipment to Massachusetts, was denied a license for a third depot in the same area by the New York State Commissioner of Agriculture and Markets on the grounds that there was no evidence that milk producers in the locality did not have an adequate market or would receive higher prices by delivering milk to the proposed receiving station and that the grant of an additional license "would tend to a destructive competition in a market already adequately served. . . ." 336 U.S. at 529.

This Court affirmed the principle set out in *Buck* and struck down the New York statute, which applied even-handedly to all milk dealers, stating:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to *every market* in the Nation. . . .

Id. at 539. [Emphasis added by District Court, 445 F. Supp. at 906. (A. 8-9.)]

Thus, the District Court, applying *Hood,* held:

> The instant case is to be governed by this doctrine. Plaintiffs must be accorded free access to every market in the Nation, including Orange, Virginia.

445 F.Supp. at 906. (A. 9.)

As recognized by the District Court, the Virginia statute obstructs the flow of interstate commerce. *Id.* (A. 8.) The District Court, after examining "the nature of the local

interest involved" to determine "the extent of the burden on interstate commerce that will be tolerated" and "whether the local interest could be promoted as well with a lesser impact on interstate commerce," as mandated by *Pike* v. *Bruce Church* and *A & P Tea Co.* v. *Cottrell,* found that the purpose of protecting dealers against unfair trade practices on the part of automobile manufacturers could be accomplished with a much lesser burden on interstate commerce.[6]

AMSC submits that the District Court properly applied the principles enunciated by this Court in *Buck, Hood, Pike* and *A & P* to the Commerce Clause question here in issue and that, because of the importance of that question to automobile manufacturers, automobile dealers and the public, the petition for certiorari should be granted.

III.

The Court Of Appeals Misapprehended The Effect Of Exxon Corp. v. Governor of Maryland On The Issue Involved In This Case.

In reversing the judgment of the District Court, the Court of Appeals relied heavily upon the decision of this Court in *Exxon Corp.* v. *Governor of Maryland, supra,* decided June 14, 1978. The Court stated:

> Tested by the principles explained in *Exxon,* we conclude that the Virginia statute imposes no unconstitutional burden on interstate commerce.

592 F.2d at 223. (A. 28.)

---

[6] The Court of Appeals overlooked the far reaching effects of Va. Code § 46.1-547(d) on interstate commerce and incorrectly held that the only effect of the statute was "the restriction of intrabrand competition." 592 F.2d at 223-224. (A. 28-29.) Moreover, the Court of Appeals failed to apply the balancing test required by *Pike* v. *Bruce Church* and *A & P Tea Co.* v. *Cottrell.*

The Maryland statute upheld in *Exxon,* however, is so different in purpose, operation, and effect from Va. Code § 46.1-547(d) that the principles enunciated in *Exxon* should not be controlling.

The Maryland statute prohibits a producer or refiner of petroleum products from operating any retail service station in Maryland and requires that such stations be operated by independent retail dealers. The statute does not limit the number of retail sellers of petroleum products; it simply prohibits a particular method for the local retail sale of such products. This Court emphasized this characteristic of the statute's operation in rejecting the Commerce Clause challenge in *Exxon:*

> We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or *methods of operation in a retail market.* [Emphasis supplied.]

437 U.S. at 127.

The statute in this case does not simply regulate the structure or methods of operation in retail markets; rather, the statute here involved prohibits a *purely interstate transaction* between a manufacturer of motor vehicles and a local automobile dealer. The effect of the Virginia statute on interstate commerce is far greater than the effect of the Maryland statute.

The Maryland statute is similar to Va. Code § 46.1-547.2 which is not involved in this case and which provides in part:

> It is unlawful for any motor vehicle manufacturer, factory branch, distributor, distributor branch or subsidiary thereof, to own, operate or control any motor vehicle dealership in this State. . . .

Exxon might well be controlling if the constitutionality of that statute were in issue or if the statute in *Exxon* had

prohibited producers and refiners from entering into new service station dealership agreements in areas already served by existing retail dealers under circumstances similar to those described in Va. Code § 46.1-547(d).

However, *Exxon* should not be controlling with respect to the constitutionality of Va. Code § 46.1-547(d) which prohibits manufacturers and others, under stated circumstances, from franchising an independent retail automobile dealer. Under the Maryland statute, the producers and refiners of petroleum products are not prohibited from shipping their products into Maryland to as many independent retail stations as are willing to buy them. Moreover, producers and refiners who had owned and operated service stations can change their method of operation by turning them over to independent dealers and thus continue to have their products sold through the same stations to the same customers. By so doing, the burden of the statute on interstate commerce can be alleviated.

However, under Va. Code § 46.1-547(d), manufacturers of motor vehicles who wish to have their products marketed in Virginia through new retail dealers and who are prohibited by the statute from so doing cannot change their method of operation to alleviate the burden on interstate commerce. These manufacturers are limited to the number of retail dealers that the state will permit through which to sell their products. In fact, if a manufacturer is prohibited by Va. Code § 46.1-547.2 from operating a retail dealership and, at the same time, is prohibited by Va. Code § 46.1-547(d) from franchising new independent retail dealerships, the burden of the latter statute on interstate commerce becomes even more onerous.

In short, Va. Code § 46.1-547(d) obstructs the flow of interstate commerce. In this case, it totally prohibits the

flow of Jeep vehicles, parts and accessories from AMSC to Early. On the other hand, the Maryland statute involved in *Exxon* merely regulates the structure or methods by which local retail sales of petroleum can be made.[7]

The scope of *Exxon* should be clarified by this Court because if the test applied by the Court of Appeals, relying on *Exxon,* is a proper one, it is difficult to conceive of any burden on interstate commerce that would be held to violate the Commerce Clause, absent discrimination between interstate and intrastate commerce. The District Court recognized the far reaching effects of statutes such as Va. Code § 46.1-547(d) on the shape of American commerce. It stated:

> Policy considerations strongly support the Court's conclusion. The shape of American commerce has been transformed by the proliferation of all types of chain and franchise business operations. Motels, drug stores, fast food restaurants, ice cream shops, variety and department stores, tire dealers and numerous other businesses frequently operate under the franchise system. If Virginia were permitted to utilize § 46.1-547(d) to keep additional motor vehicle franchises out of areas of high unemployment and slow population growth, it could enact similar statutes to bar all types of additional franchises from what it views to be economically weak markets. Under such circumstances, the State, rather than the marketplace, would become the arbiter of the appropriate level of competition in each franchised industry. And if Virginia could constitutionally do this,

[7] The holding in *Exxon* is consistent with the holdings of this Court in *Breard* v. *Alexandria,* 341 U.S. 622 (1951), and *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951), cited by the Court of Appeals at 592 F.2d at 223. (A. 27.) Each deals with a regulation of methods of local sales to local retail customers. This case, however, deals with a statute the effect of which is to prohibit an interstate transaction between a manufacturer and a retail dealer.

> so could every other state. The end result would be the kind of restrictive and segmented economy which the Commerce Clause was specifically intended to prohibit. *See H. P. Hood & Sons* v. *Du Mond, supra* at 538-39.

445 F.Supp. at 911. (A. 19.)

AMSC submits that the Court of Appeals misapprehended the effect of this Court's decision in *Exxon* on the important constitutional question involved in the present case. For this reason also, the petition for certiorari should be granted.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
Post Office Box 1122
Richmond, Virginia 23208
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 1979, three copies of the Petition for Writ of Certiorari were mailed, first class postage prepaid, to the Honorable J. Marshall Coleman, Attorney General of the Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219, counsel for respondents Division of Motor Vehicles of the Commonwealth of Virginia and Vern L. Hill, Commissioner of the Division of Motor Vehicles of the Commonwealth of Virginia, and to David F. Peters, Esquire, and Dale A. Oesterle, Esquire, Hunton & Williams, P. O. Box 1535, Richmond, Virginia 23212, counsel for respondent Virginia Automobile Dealers Association. I further certify that all parties required to be served have been served.

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
Post Office Box 1122
Richmond, Virginia 23208
Counsel for Petitioner

TABLE OF CONTENTS

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 76-0513-R

American Motors Sales Corporation, et al.,
Plaintiffs,

v.

Division of Motor Vehicles of the Commonwealth of Virginia, et al.,
Defendants.

ORDER

Deeming it just and proper so to do, for the reasons stated in the memorandum this day filed, it is hereby ADJUDGED and ORDERED that the defendants' motion for summary judgment be denied and the plaintiff's motion for summary judgment be, and the same is hereby granted, and judgment is entered accordingly.

Section 46.1-547(d) of the Virginia Code is hereby declared unconstitutional and the defendant Vern L. Hill, Commissioner of the Division of Motor Vehicles, and his agents, servants, employees and all acting in concert therewith be, and they are hereby enjoined from giving any further force or effect to said statutory provision.

Let the Clerk send a copy of the memorandum and this order to all counsel of record.

ROBERT R. MERHIGE, JR.
United States District Judge

February 13, 1978

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 76-0513-R

American Motors Sales Corporation, et al.,

v.

Division of Motor Vehicles of the
Commonwealth of Virginia, et al.

MEMORANDUM

Plaintiffs, American Motors Sales Corporation (American) and Early AMC, Inc. (Early), bring this action challenging the constitutionality of § 46.1-547(d) of the Code of Virginia and seeking declaratory and injunctive relief. Defendants are the Division of Motor Vehicles of the State of Virginia (DMV) and Vern L. Hill, Commissioner of the DMV (the Commissioner). P. D. Waugh & Co. (Waugh) and the Virginia Automobile Dealers Association (Dealers Association) have intervened as defendants. Jurisdiction is attained pursuant to 28 U.S.C. §§ 1331(a), 1337, 1343(3) and 2201. The matter comes before the Court on cross motions for summary judgment and is ripe for disposition.

Section 46.1-547(d), the challenged statute, provides that it is unlawful for any manufacturer or distributor of motor vehicles:

> To grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor has first advised in writing such other dealers in the line-make in the trade area; *provided that no such*

> . *additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area;* provided, further, that a reopening of a franchise in a trade area that has not been in operation for more than one year shall be deemed the establishment of a new franchise subject to the terms of this subsection. [Emphasis added].

The uncontested facts leading to the instant challenge are as follows:

Plaintiff American is in the business of selling AMC and Jeep motor vehicles, parts and accessories to franchised dealers throughout the United States, including Virginia. American is a "manufacturer" and "distributor" of motor vehicles within the meaning of § 46.1-547 of the Virginia Code. Plaintiff Early is a motor vehicle dealership located in Orange, Virginia, presently holding franchises to sell Subaru and AMC vehicles, but not Jeeps.

Defendant DMV is an agency of the State of Virginia having the power and duty of administering the motor vehicle laws of the State, including § 46.1-547(d). Defendant Hill is the Commissioner of the DMV and is responsible for administering the provisions of the Virginia Motor Vehicle Dealer Licensing Act (Title 46.1, Chapter 7 of the Virginia Code), including § 46.1-547(d). Additionally, Hill is charged under the provisions of § 46.1-547(a) & (b) of the Virginia Code with promoting the interest of retail buyers of motor vehicles and with preventing unfair methods of competition and unfair or deceptive acts or practices in the motor vehicle trade. Defendant intervenor P. D. Waugh & Co. is a motor vehicle dealer in Orange, Virginia currently

holding a non-exclusive franchise for the sale of Jeep vehicles. Defendant intervenor Dealers Association is a statewide trade association for Virginia automobile dealers which assisted in the drafting of § 46.1-547(d).

In April 1975, upon the request of plaintiff Early, American offered Early a Jeep franchise to be operated at Early's established location in Orange, Virginia. Since Waugh already held (and still holds) a Jeep franchise in Orange, Virginia, Early's Jeep franchise would be an "additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make" within the meaning of the challenged statute.

On October 28, 1975, pursuant to the terms of the statute, American advised Waugh in writing of its intention to grant the additional Jeep franchise in Orange, Virginia. Waugh, exercising its rights under the statute, requested that the Commissioner hold a hearing to determine whether the market would support all of the dealerships in the Jeep line-make should such additional franchise be granted. On February 20, 1976, a hearing officer for the Division conducted the appropriate hearing, and found that Waugh's sales performance had been below American's expectations. The hearing officer therefore concluded that the contemplated additional Jeep franchise should be allowed on the grounds that no reasonable evidence had been produced that the market would not support all of the dealerships in the Jeep line-make after the grant of Early's franchise. Upon review, however, the Commissioner disagreed with the hearing officer's conclusion and issued a decision prohibiting American from granting the proposed franchise to Early.

Plaintiffs contend that they have lost and continue to lose substantial sales of Jeep vehicles as a direct result of the

Commissioner's decision. Plaintiffs pray for a declaratory judgment that § 46.1-547(d) violates the Supremacy, Commerce, Due Process and Equal Protection Clauses of the Constitution of the United States, and seek from this Court an injunction prohibiting the DMV and its agents from enforcing the provisions of the challenged statute.

For the reasons which follow, the Court finds that Virginia Code § 46.1-547(d) violates the Commerce Clause of the Constitution of the United States.

That the challenged statute affects interstate commerce is beyond question. Only Ford and Volvo motor vehicles are manufactured within the borders of the Commonwealth of Virginia. All other makes of motor vehicles sold in Virginia, including Jeeps, are manufactured outside of Virginia and hence are articles of interstate commerce. Because the challenged statute restricts the sale of automobiles at certain locations, it affects interstate commerce.

In *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366 (1976) the Supreme Court enunciated the test for determining the validity of state statutes affecting interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activities.

Id. at 371-72 (citations and footnote omitted).

The threshold inquiry under *Cottrell* is to determine whether the challenged statute effectuates "a legitimate local purpose."

Although there is no meaningful legislative history available for § 46.1-547(d), the defendants assert that the statute has two major purposes. First, defendants contend that the statute preserves competition in retail automobile sales within the Commonwealth. Second, defendants argue that the statute provides the franchised automobile dealers with a minimum of protection against unfair and unreasonable treatment by automobile manufacturers and distributors.

The Purpose Of Preserving Competition

Defendants contend that § 46.1-547(d) preserves competition in retail automobile sales in Virginia by prohibiting manufacturers from granting an excessive number of franchises in a given trade area, a practice which could lead to destructive competition and consequent business failures. In the defendants' view, the statute thus protects the goodwill, equity and investment of motor vehicle dealers. Additionally, defendants argue, the statute protects the interests of the consuming public in the continuous operation of reasonably accessible motor vehicle dealers, resulting in wider selection, lower prices and better maintenance and service facilities. Finally, defendants contend that the statute protects against the adverse effects of business failures on employment and the general economy.

Similar contentions were asserted by the State in the case of *Buck* v. *Kuykendall,* 267 U.S. 307 (1925). In *Buck,* the challenged state statute prohibited common carriers from operating for hire over regular routes without first obtaining from the State a certificate declaring that the public convenience and necessity required such operation. Such a

certificate could not be granted for any territory which was "already being adequately served." The appellant in *Buck* had applied for a certificate and had been refused on grounds that adequate transportation facilities were already available for his proposed route. The State argued that it owned and maintained the highways and was responsible for securing the safety and public convenience in the use of them. If too many vehicles used the highways, both the danger and wear and tear grew. The exclusion of unnecessary vehicles promoted both safety and economy. Thus, the State argued, its statute was "not objectionable because it is designed primarily to promote good service by excluding unnecessary competing carriers." 267 U.S. at 314-15.

The Supreme Court squarely rejected the State's contention. Mr. Justice Brandeis, speaking for the Court, characterized the statute as follows:

> Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause.

267 U.S. at 315-16.

Precisely the same conclusion is mandated in the instant case. The challenged Virginia statute is designed not to promote safety or public health but to prohibit additional competition in certain areas. Section 46.1-547(d) determines not the manner in which automobiles may be sold

but rather who may sell them. The statute prohibits Early from selling Jeep vehicles while permitting Waugh to sell Jeep vehicles "for the same purpose and in the same manner" proposed by plaintiffs. Thus, the challenged statute is a regulation not merely of Virginia's markets, but of interstate commerce itself. Its effect on interstate commerce is "not merely to burden but to obstruct it," for plaintiff American is totally prohibited from selling Jeep vehicles through Early's present franchise. Under *Buck* v. *Kuykendall,* such a result is inconsistent with the mandates of the Commerce Clause of the Constitution of the United States.

In *H. P. Hood & Sons* v. *Du Mond,* 336 U.S. 525 (1949), the Supreme Court reaffirmed the principle of *Buck* v. *Kuykendall.* In *Hood,* the Court struck down a New York statute which granted the state the power to deny a license for a new milk receiving plant unless the State's Commissioner of Agriculture and Markets was satisfied "that the issuance of the license will not tend to a destructive competition in a market already adequately served."

The statute at issue in the instant case is almost identical in effect to the provision declared unconstitutional in *Hood.* Section 46.1-547(d) effectively gives the defendant Commissioner authority to deny permission for a new automobile franchise in Virginia unless he is satisfied that any such franchise will not be destructive of any dealerships in the same line-make of motor vehicle already serving the trade area. In *Hood,* the Court condemned such efforts to use state police powers as a basis for suppressing competition. After citing *Buck* v. *Kuykendall* as authority for striking down "parochial legislative policies" designed to limit competition, 336 U.S. at 538, the *Hood* Court declared:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be en-

> couraged to produce by the certainty that he will have free access to *every market* in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

336 U.S. at 539 (emphasis added).

The instant case is to be governed by this doctrine. Plaintiffs must be accorded free access to every market in the Nation, including Orange, Virginia. The State cannot assert the purpose of preserving competition as appropriate justification for denying plaintiffs a new franchise in the location of their choosing.

The wisdom of the *Hood* doctrine has often been reaffirmed. The United States Supreme Court has frequently cited and quoted from *Hood* with approval in recent Terms. *See, e.g., Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 285 n.21 (1977); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 380 (1976).

More recently, in *Great Western United Corp.* v. *Kidwell*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,187 (N.D. Tex. Sept. 2, 1977), the court cited *Hood* in declaring Idaho's highly restrictive tender offer statute unconstitutional under the Commerce Clause. Rejecting arguments similar to the ones made in the instant case, the court stated:

> The ultimate purpose of the Idaho statute is to thwart tender offers and thereby prevent possible removal of the target company or its management, the closing of plants and related effects on the state's economy. But a state

> may not legitimate its regulation of interstate commerce by asserting this type of interest. As stated by the Supreme Court in *Hood* . . . a statute may not be enacted "solely for protection of local economic interests."

Id. at 92,368. In the instant case as well, though Virginia may fear adverse economic and social consequences if automobile manufacturers are allowed unrestricted access to all Virginia markets, such state interests cannot justify § 46.1-547(d).

The Court thus concludes that the purpose of preserving competition in retail automobile sales in Virginia is not a "legitimate local purpose" under the Commerce Clause. The statute therefore cannot stand on that purpose. This conclusion, however, is not the end of the Court's inquiry. The Court must still consider whether the second purpose asserted by defendants, the protection of automobile dealers against unfair treatment by manufacturers, satisfies the test of *A & P* v. *Cottrell.*

The Purpose Of Protecting Against Unfair Trade Practices

Defendants assert that § 46.1-547(d) is supported by the legitimate state interest of protecting small independent automobile dealers from unfair and abusive treatment by the giant automobile manufacturers. The Court is in full agreement that this is a "legitimate local purpose" under the Commerce Clause. The abuses occasioned by the vast disparity in bargaining power between individual motor vehicle franchises and the megacorporations which manufacture and distribute motor vehicles are well documented in the legislative history of the Federal Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225. See H.R. Rep. No. 2850, 84th Cong., 2d Sess., *reprinted in* [1956] *U.S. Code*

Cong. & Ad. News 4596. Even counsel for American acknowledged in his opening statement at the DMV hearing that it would be an unfair trade practice for a manufacturer to establish so many dealerships in a trade area that it would be a foregone conclusion that not all of the dealers would be able to meet the minimum sales requirements specified in their contracts.[1] As counsel for American recognized, such deliberate overloading would give the manufacturer power under the terms of the standard franchise agreement to "start terminating willy-nilly." The State undoubtedly has authority to combat such a practice.

Despite this legitimate local purpose, the Court concludes that § 46.1-547(d) is unconstitutional under the rule of *A & P* v. *Cottrell* because the State's purpose "could be promoted as well with a lesser impact on interstate activities." 424 U.S. at 372.

The defendants' theory is that the establishment of an additional franchise in a trade area which will not support all dealerships after the grant of the additional franchise can have no other purpose than to drive an existing dealer out of business. Accordingly, defendants argue that § 46.1-547(d) is necessary to prevent manufacturers from deliberately overloading a trade area with the intention of forcing certain dealers out of business. Defendants also argue that without § 46.1-547(d)'s restrictions on additional franchises, manufacturers could run established dealers out of business with impunity by setting up competing "sweetheart" dealerships which would gain an unfair competitive advantage. In the defendants' view, § 46.1-547(d) provides the mini-

---

[1] The standard Jeep dealership franchise contract includes a specific minimum sales requirement. A dealer's failure to meet the minimum sales requirement may be cause for termination. Apparently other motor vehicle manufacturers also write minimum sales requirements into their franchise agreements.

mum necessary restrictions to guard against these unfair trade practices.

The defendants' explanation, while appealing on the surface, is tainted at the roots. According to the defendants, the Commissioner's determination under § 46.1-547(d) that an additional franchise will overload the market proves that the manufacturer is acting in bad faith. But this implicit statutory presumption is entirely without support. Indeed, it is contradicted by the facts of this case, by the legislative history of the Federal Dealers' Day in Court Act, and by other evidence before this Court.

The facts of this case were developed at the DMV hearing convened at Waugh's request pursuant to § 46.1-547(d) on February 20, 1976. At that hearing Waugh challenged American's right to grant a Jeep franchise to Early at his Orange, Virginia location. Waugh sought to meet its evidentiary burden under § 46.1-547(d) by offering testimony that three of the principal employers in Orange County had recently shut down their manufacturing operations; that unemployment in Orange County had consequently climbed to 14% (well above the Virginia State average); and that the projected population growth for Orange County was very low and did not augur well for increased Jeep sales. Waugh acknowledged that his sales had fallen below his contractual minimum sales requirement during 1974 and 1975, but he argued that his minimum sales requirement was unrealistically high because the Orange, Virginia economy was in recession and because American had arbitrarily expanded the trade area on which his minimum sales requirement was based. Waugh further argued that he had aggressively pursued sales in his assigned trade area and that there was no slack in the market that could be taken up by a new dealership in Orange without hurting Waugh's sales.

Waugh concluded that the Orange, Virginia trade area could not support an additional Jeep dealership and that American's only possible intention in offering a franchise to Early was to push Waugh out of the market.

American sought to counter Waugh's conclusions by presenting evidence that Waugh's minimum sales requirement had been calculated according to the same formula used by American nationally; that this formula had proven accurate and realistic in past years; and that Waugh's poor sales record in 1974 and 1975 could not be explained by high unemployment in Orange because other line-makes of four-wheel-drive vehicles had continued to prosper in the same trade area. American therefore contended that the Orange, Virginia market area would support an additional Jeep franchise; that the additional Jeep franchise would not take sales away from Waugh but rather would capture the potential sales which Waugh had been losing; and that the establishment of Early's franchise was in no way intended to drive Waugh out of business. On the contrary, American asserted that it had elected to establish a second Jeep dealership in Waugh's market area as an alternative to terminating Waugh for his below-contract sales record, and had no intention of phasing out Waugh's Jeep dealership after Early's franchise was established.

Despite the Commissioner's determination that an additional Jeep franchise in Orange would violate the terms of § 46.1-547(d), the Court finds no evidence in the hearing record of bad faith on the part of American. Waugh did not show that American had calculated his minimum sales requirement by using a formula different from that applied to every other Jeep dealer in the Nation. Nor was it shown that American's national formula was irrational or historically inaccurate. Moreover, Waugh did not present a

scintilla of evidence that American intended to give Early favorable "sweetheart" treatment in order to drive Waugh out of business. Thus, even if the Commissioner is correct that an additional Jeep dealership in Orange, Virginia would overload the market, the facts of this case lend no support to the implicit statutory presumption of bad faith on the part of the manufacturer.

The legislative history of the Federal Dealers' Day in Court Act also undercuts the presumption of bad faith implicit in § 46.1-547(d). The Federal Act guarantees dealers freedom from threats, coercion or intimidation by manufacturers. *See* 15 U.S.C. §§ 1221-1222. However, the Federal Act does not contain any provision parallel to § 46.1-547(d) of the Virginia Code. The House Report accompanying the Federal Act explained the absence of such a provision as follows:

> The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. *The committee emphasizes that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. Appointment of added dealers in an area is a normal competitive method of securing better distribution* and curtailment of this right would be inconsistent with the antitrust objectives of this legislation. Under the bill, a manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment.

[1956] *U.S. Code Cong. & Ad. News, supra* at 4603-04 (emphasis added). Thus, the Congress of the United States saw nothing inherently abusive in the establishment of com-

peting dealerships in a trade area even when the additional dealership threatened to diminish an existing dealer's profit or undermine his investment. In contrast to the Virginia statute's implicit presumption that a new dealership is an act of bad faith by the manufacturer if the market will be unable to support all dealerships in the area, the Federal Act requires independent proof of bad faith before the additional dealership can be prohibited.

Federal courts have frequently relied on the legislative history of the Federal Act in holding that the establishment of a competitive dealership in the same line-make does not by itself constitute a breach of good faith. *See, e.g., Southern Rambler Sales, Inc.* v. *American Motors Corp.,* 375 F.2d 932 (5th Cir. 1967); *Garvin* v. *American Motors Sales Corp.,* 318 F.2d 518 (3d Cir. 1963). In *Garvin,* for example, an American Motors dealer argued, as Waugh argues here, that the establishment of a competing American Motors dealership in his one-dealer town constituted an act of bad faith by the manufacturer. The Court flatly rejected the plaintiff's contention, stating: "[T]he record is completely devoid of any evidence to show that the new dealership was established as a device to coerce Garvin. In the absence of such a showing, plaintiff's argument is without merit." 318 F.2d at 520.

Finally, the presumption of bad faith underlying § 46.1-547(d) is refuted by the uncontroverted affidavit of American's Franchise Review Manager, Mr. Thomas Kessler. Based upon his studies of six separate American market areas around the country, Mr. Kessler found that existing Jeep dealerships under competent management usually increase their sales after a competing dealership is added in their trade area. Such sales increases are explained, according to Mr. Kessler, by the increases in advertising, service

facilities, and customer traffic that accompany the establishment of an additional dealership in a trade area. Mr. Kessler also stated, based on his twenty-three years in the automotive business, that he knew of "no instance in which either a competently managed existing dealer or a new dealer has been forced out of business because of the division of a Jeep market between such dealers."

In light of all of the evidence, the Court concludes that the implicit presumption of bad faith contained in § 46.1-547(d) cannot be rationally supported. While it may well be that additional dealerships are sometimes established in bad faith, the oversimplified test of § 46.1-547(d) fails to distinguish between additional dealerships so established and those which are established in good faith. Indeed, as the instant case shows, the good faith of a manufacturer in granting a new franchise is no defense under the statute if the Commissioner finds reasonable evidence that the market will not support all of the dealerships in the trade area after the grant of the additional franchise.

It is thus inevitable that § 46.1-547(d) will sometimes prohibit manufacturers from adding dealerships in good faith simply because the Commissioner believes that the market will not bear an additional franchise. In the Court's view, this amounts to nothing less than the repression of competition on grounds that the trade area is "already being adequately served" and that the establishment of an additional franchise will lead to "destructive competition." Such a result is impermissible under the Commerce Clause.

More importantly, by sometimes barring additional dealerships which manufacturers seek to add in good faith, the statute sweeps more broadly than its stated objective of protecting Virginia automobile dealers against unfair practices by automobile manufacturers. In light of this, *A & P* v.

Cottrell mandates that the Court inquire "whether adequate and less burdensome alternatives exist." 424 U.S. at 373.

The statute apparently seeks to prevent two different unfair practices. The first unfair practice is the deliberate overloading of a trade area with dealerships to the end that the manufacturer may pick and choose which dealers to terminate. The second is the setting up of "sweetheart" dealerships in which the manufacturer favors a new dealer in order to push an established dealer out of business.

In the Court's view, the Commonwealth of Virginia can deal with the problem of deliberate overloading of a trade area with dealerships without resort to the burdensome provisions of § 46.1-547(d). The State need only prohibit any manufacturer from assigning aggregate minimum sales requirements in a trade area in excess of the manufacturer's good faith projections for sales in that particular trade area. For example, if there is one dealer in a trade area and the manufacturer projects total sales of 60 vehicles in that area, the manufacturer may not set that dealer's minimum sales requirement above that number. If the manufacturer decides to establish an additional dealership in the same trade area, he could be required to adjust the minimum sales requirement of the existing dealer so that the total minimum sales requirements for the older dealership and the new dealership do not exceed 60 vehicles. Each of the two dealers might be assigned a minimum sales requirement of 30, for example. The manufacturer could be prohibited from assigning a minimum sales requirement of 40 to each dealer until the total good faith projected sales for the trade area reached 80 vehicles. This prohibition would accomplish the State's objective of preventing automobile manufacturers

from deliberately overloading trade areas in order to terminate dealers at will.[2]

The Court is also of the view that the State can deal with the potential problem of "sweetheart" dealerships by means less sweeping than § 46.1-547(d). When a manufacturer establishes an additional dealership in a trade area, the State can insist that the manufacturer continue to treat the existing dealership fairly. Of course, some differences in treatment between a new dealer and a more experienced dealer can be expected. But if the new dealer receives significantly more favorable treatment than the older dealer, the State may require the manufacturer to show that any such differences in treatment can be rationally explained and are not intended to force the older dealer out of business. Such a statutory scheme would attack the problem of "sweetheart" dealerships without placing obstacles in the way of good faith new dealerships.

Finally, parallel to the scheme of the Federal Act, the State may of course exercise its power to prohibit the establishment of additional dealerships as devices to coerce or intimidate existing dealers. *Cf. Southern Rambler Sales, Inc.* v. *American Motors Sales Corp., supra.* It would appear to the Court that § 46.1-546 of the Virginia Code already gives the State this power, making § 46.1-547(d) entirely unnecessary for this purpose. It thus appears to the

---

[2] Needless to say, the State may question the good faith of the manufacturer's sales projections for a given trade area. However, if the manufacturer has used a consistent national formula, as in the instant case, then such inquiry must be limited to determining whether this formula has some reasonable basis in historical fact. Unless the manufacturer's sales projections are so shamelessly at odds with experience that they indicate bad faith, the method of calculation must be left to the manufacturer. Otherwise, the State rather than the manufacturer would become the judge of whether a given trade area was "already being adequately served." That is impermissible. *H. P. Hood & Sons* v. *Du Mond, supra; Buck* v. *Kuykendall, supra.*

Court that all of the State's objectives regarding the prevention of unfair trade practices against motor vehicle dealers could be accomplished with a lesser burden on interstate commerce than that imposed by § 46.1-547(d).

In conclusion, the Court holds that (1) the preservation of competition is not a legitimate local purpose under the Commerce Clause; and (2) the prevention of unfair trade practices is a legitimate local purpose, but this purpose could be accomplished with a much lesser burden on interstate commerce. The Court therefore finds that § 46.1-547(d) is unconstitutional under the test enunciated in *A & P* v. *Cottrell.*

Policy considerations strongly support the Court's conclusion. The shape of American commerce has been transformed by the proliferation of all types of chain and franchise business operations. Motels, drug stores, fast food restaurants, ice cream shops, variety and department stores, tire dealers and numerous other businesses frequently operate under the franchise system. If Virginia were permitted to utilize § 46.1-547(d) to keep additional motor vehicle franchises out of areas of high unemployment and slow population growth, it could enact similar statutes to bar all types of additional franchises from what it views to be economically weak markets. Under such circumstances, the State, rather than the market-place, would become the arbiter of the appropriate level of competition in each franchised industry. And if Virginia could constitutionally do this, so could every other state. The end result would be the kind of restrictive and segmented economy which the Commerce Clause was specifically intended to prohibit. *See H. P. Hood & Sons* v. *Du Mond, supra* at 538-39.

As the resolution of the plaintiff's remaining constitutional challenges to § 46.1-547(d) is unnecessary to appro-

priate adjudication of the instant case, the Court refrains from deciding any constitutional issues other than those raised under the Commerce Clause. *See Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

An appropriate order shall issue.

ROBERT R. MERHIGE, JR.
United States District Judge

February 13, 1978

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1135

American Motor Sales Corporation, a Delaware corporation, and Early AMC, Inc., a Virginia corporation,
Appellees,

v.

Division of Motor Vehicles of the Commonwealth of Virginia, et al.,
Appellants.

No. 78-1136

American Motor Sales Corporation, a Delaware corporation, and Early AMC, Inc., a Virginia corporation,
Appellees,

v.

Virginia Automobile Dealers Association,
Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge.

Argued: July 18, 1978 Decided: February 12, 1979

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges.

BUTZNER, Circuit Judge:

Virginia Code § 46.1547(d) prevents a motor vehicle manufacturer or distributor from granting an additional franchise for a particular line-make of vehicle in a trade area already served by one or more dealers carrying the same line if, after a hearing requested by a dealer selling the same line in the area, the State Commissioner of Motor Vehicles determines that the market will not support all of the dealerships.[1] The Division of Motor Vehicles of the Commonwealth of Virginia and the Virginia Automobile Dealers Association appeal a judgment enjoining enforcement of this statute and declaring it an unconstitutional burden on interstate commerce.[2] We held this case under

---

[1] Virginia Code § 46.1-547(d) (Cum. Supp. 1978) provides:

> It is unlawful for any manufacturer, factory branch, distributor or distributor branch, or any field representative, officer, agent or any representative whatsoever of any of them:
>
> * * *
>
> (d) To grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor has first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; provided, further, that a reopening of a franchise in a trade area that has not been in operation for more than one year shall be deemed the establishment of a new franchise subject to the terms of this subsection[.]

[2] Some state courts have held that similar statutes do not violate the commerce clause. *See, e.g.*, Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360, 365 (1960); Forest Home Dodge, Inc. v. Karns, 29 Wis.2d 78, 138 N.W.2d 214, 222 (1965). Other courts have in-

advisement pending decision of New Motor Vehicle Board v. Orrin W. Fox Co., 99 S. Ct. 403 (1978). In light of that decision and Exxon Corp. v. Governor of Maryland, 98 S. Ct. 2207 (1978), which were unavailable to the district court, we now reverse.

I

American Motor Sales Corporation, a Delaware corporation with a principal place of business in Michigan, sells both AMC and Jeep vehicles to franchised dealers throughout the United States. Early AMC, Inc., is a franchised AMC and Subaru dealership in Orange, Virginia. P. D. Waugh & Co., an intervening defendant in the district court, is the only Jeep dealer in Orange. The Virginia Automobile Dealers' Association, which also intervened, is a statewide trade association that helped to draft the challenged statute.

Jeeps, like most motor vehicles sold in Virginia, come from outside the state. Only Ford and Volvo manufacture in Virginia. Jeeps compete directly with other four-wheel drive vehicles distributed by American's competitors. American recognizes a distinct market for four-wheel drive vehicles and calculates its sales projections for Jeeps with reference to that market. Lost Jeep sales redound to the benefit of the other companies that sell four-wheel drive vehicles.

In 1975, American notified Waugh that it intended to grant Early a Jeep franchise at Early's established location

---

validated them. *See, e.g.*, General GMC Trucks, Inc. v. General Motors Corp. 239 Ga. 373, 237 S.E.2d 194, 196-98 (1977); *cf.* General Motors Corp. v. Blevins, 144 F. Supp. 381, 394-95 (D. Colo. 1956). *See generally* Macaulay, Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System, Pt. I, 1965 Wis. L. Rev. 483, 513-26, Pt. II, 1965 Wis. L. Rev. 740, 789-93 (1965).

about two miles from Waugh's dealership. Since the franchise would permit Early to sell Jeeps in the trade area already served by Waugh, Waugh requested the Virginia Commissioner of Motor Vehicles to conduct a hearing pursuant to Virginia Code § 46.1-547(d) to determine whether the market could support both dealerships. At the hearing, American sought to prove that Waugh was selling far fewer Jeeps than American had projected on the basis of its assessment of demand in the Orange market area. The hearing officer found that Waugh's sales performance had been inadequate and that no reasonable evidence showed the trade area could not support two Jeep dealers. He therefore concluded that the additional franchise should be permitted. The commissioner, however, rejected the hearing officer's conclusion and prohibited American from granting a Jeep franchise to Early.

American and Early filed suit in the district court, seeking a declaratory judgment and an injunction against enforcement of § 46.1-547(d) on the grounds that it violated the supremacy, commerce, and due process clauses of the United States Constitution.[3] The defendants argued that the statute was a valid regulation designed to prevent destructive competition among local dealers and unfair trade practices by automobile manufacturers. On cross motions for summary judgment, the court held that the prevention of destructive competition is not a legitimate local purpose under the commerce clause and that the state could prevent unfair trade practices without imposing so great a burden on interstate commerce. The court did not reach

[3] American and Early did not claim that the Commissioner of Motor Vehicles' decision was arbitrary, based on insufficient evidence, or invalid for any other similar reasons.

the plaintiffs' other constitutional claims, and those claims were not argued in this appeal.[4]

II

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), enunciates the standard for determining the validity of a state statute challenged under the commerce clause:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

We therefore must decide (1) whether the Virginia automobile franchise statute promotes a legitimate local purpose, (2) whether it treats interstate and intrastate commerce evenhandedly, and (3) whether the burden imposed on interstate commerce appears excessive when balanced against the state's interest. *See* Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440-42 (1978); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 371-72 (1976).

III

The recent decision in New Motor Vehicle Board v. Orrin W. Fox Co., 99 S. Ct. 403 (1978), simplifies our

[4] The district court's opinion is reported at 445 F. Supp. 902 (E.D. Va. 1978).

resolution of the first question. There, the Court considered the validity of a California statute similar in many respects to the Virginia statute and the statutes adopted by 15 other states. *See* 99 S. Ct. at 408 n.7. Noting the "disparity in bargaining power between automobile manufacturers and their dealers," the Court observed that the franchise regulation "protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees, where the effect of such intra-brand competition would be injurious to the existing franchisees and to the public interest." 99 S. Ct. at 407-08. The Court identified the purpose of such laws as "the promotion of fair dealing and the protection of small business." 99 S. Ct. at 408 n.7. It then held that the state legislature "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." 99 S. Ct. at 411.

The Virginia statute serves the same public interests identified by the Court in *Orrin W. Fox Co.* Although that case was testing the California law under the due process clause and the Sherman Act, the Court's recognition of the legitimacy of state regulation designed to protect those interests is pertinent to our inquiry here. Consequently, we conclude that the Virginia statute regulating the establishment of new automobile franchises serves a legitimate local purpose.

IV

The Virginia statute draws no distinction between manufacturers that produce cars within the state and those that

do not. Therefore, it does not discriminate against interstate commerce. *See* Breard v. Alexandria, 341 U.S. 622, 633-41 (1951); Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329, 336-37 (1951). Since the statute regulates evenhandedly and furthers a legitimate local interest, it satisfies *Pike v. Bruce Church's* first two requirements for conformity with the commerce clause. It is for these reasons that the Virginia statute is distinguishable from the statutes invalidated in the cases on which the appellees principally rely.[5]

V

Pike v. Bruce Church also requires that a state statute not impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142. The appellees argue that the Virginia statute is unconstitutional because it totally obstructs interstate commerce in Jeeps between American and Early. The Supreme Court rejected essentially the same argument in Exxon Corp. v. Governor of Maryland, 98 S. Ct. 2207 (1978).

Exxon held that a Maryland statute requiring petroleum refiners to divest themselves of all retail stations within the state did not impermissably burden interstate commerce. The Court recognized that divestiture might cause some refiners to stop selling gasoline in the state and that the discontinuance of refiner-operated stations might deprive consumers of certain services. Despite these effects, the Court ruled that the statute did not violate the commerce clause. After pointing out that the products of other inter-

---

[5] *See* H. P. Hood & Sons, Inc. v. Du Mond; 336 U.S. 525 (1949); Buck v. Kuykendall, 267 U.S. 307 (1925).

state refiners would probably replace those distributed by the companies withdrawing from the state, the Court explained that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." 98 S. Ct. at 2214. The commerce clause, the Court continued, "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 98 S. Ct. at 2215.

Tested by the principles explained in *Exxon*, we conclude that the Virginia statute imposes no unconstitutional burden on interstate commerce. The public in the Orange market area may buy as many Jeeps as Waugh can sell. If Waugh does not persuade potential purchasers to buy Jeeps, they will buy competitive vehicles. Conversely, American and its competitors can supply the market with all the four-wheel drive vehicles that it will absorb. The statute may affect the structure of the retail market by shifting business from one out-of-state manufacturer to another. But, when a statute is otherwise valid, the commerce clause does not insulate this aspect of trade from state regulation. *Exxon,* 98 S. Ct. at 2215.

The Virginia statute restricts intrabrand competition between Jeep dealers by excluding Early from the Orange market. But that effect alone does not establish a violation of the commerce clause. In New Motor Vehicle Board v. Orrin W. Fox Co., 99 S. Ct. 403, 412-13 (1978), the Supreme Court considered the contention that a similar California statute violated the Sherman Act by facilitating private restraints of trade. The Court first rejected that argument on the ground that the law was a legitimate regulation covered by the state action exemption to the antitrust laws formulated in Parker v. Brown, 317 U.S. 341 (1943). The Court then went on to say:

> Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition. "This is merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—'our charter for economic liberty' . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." Exxon v. Governor of Maryland, [98 S. Ct. 2207, 2218 (1978)].

The Court's analysis in *Orrin W. Fox Co.* dealt with the Sherman Act, but the case is relevant to our consideration of the commerce clause. Since the Court found that a statute similar to Virginia's did not foster an illegal restraint of trade, something in addition to such a restraint would have to be shown to establish an unconstitutional burden on interstate commerce. The record, however, discloses no other effect than the restriction of intrabrand competition.

Nevertheless, if Virginia's regulation of intrabrand competition were to conflict with a federal law governing interstate commerce, the state statute would be invalid. Relying on this principle, American emphasizes that the legislative history of the federal Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225, discloses that Congress rejected a provision that would have restricted a manufacturer's power to enfranchise additional dealers in a market area. *See* H.R. Rep. No. 2850, 84th Cong., 2d Sess., *reprinted in* [1956] U.S. Code Cong. & Admin. News 4596, 4603-04. The federal act, however, does not preempt state legislation for the protection of automobile dealers unless there is a direct,

irreconcilable conflict between express provisions of the state and federal laws. 15 U.S.C. § 1225. Here no statutory conflict exists. Congressional reluctance to restrict intrabrand competition demonstrates only a difference of opinion about the wisdom of inhibiting a manufacturer's power to grant dealer franchises; it does not show that state-imposed restrictions are undue burdens on commerce. Exxon Corp. v. Governor of Maryland, 98 S. Ct. 2207, 2215 (1978). We therefore hold that the Virginia automobile franchising statute does not violate the commerce clause.

VI

The district court did not address other constitutional challenges to the statute, and the parties did not brief them here. Since American and Early have reserved those challenges, we remand the case for the consideration of issues that they now may wish to press in the district court.

The judgment of the district court is reversed; the injunction against enforcement of Virginia Code § 46.1-547(d) is dissolved; and the case is remanded to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1135

American Motors Sales Corp., a Delaware corporation, and Early AMC, Inc., a Virginia corporation,
Appellees,

v.

Division of Motor Vehicles of the Commonwealth of Virginia, and Vern L. Hill, Commissioner of the Division of Motor Vehicles,
Appellants,

and

P. D. Waugh & Co. and Virginia Automobile Dealers Association,
Intervening Defendants.

No. 78-1136

American Motors Sales Corp., a Delaware corporation, and Early AMC, Inc., a Virginia corporation,
Appellees,

v.

Division of Motor Vehicles of the Commonwealth of Virginia, and Vern L. Hill, Commissioner of the Division of Motor Vehicles,
Defendants,

and

P. D. Waugh & Co.,
Intervening Defendant,

and

Virginia Automobile Dealers Assoc.,
Appellants.

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Butzner, Judge Russell, and Judge Widener.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

March 7, 1979

Supreme Court, U. S.
FILED
JUL 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1802.

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA
and
VERN L. HILL,
Commissioner of the Division of Motor Vehicles of the Commonwealth of Virginia,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS, VIRGINIA DIVISION OF MOTOR VEHICLES AND VERN L. HILL, IN OPPOSITION.

JOHN HARDIN YOUNG,
Four Penn Center Plaza,
Philadelphia, Pa. 19103
Counsel for Respondents, Commonwealth of Virginia and Vern L. Hill

MARSHALL COLEMAN,
Attorney General of Virginia,
WALTER A. MCFARLAND,
Deputy Attorney General,
A. R. WOODROOF,
Assistant Attorney General,
Supreme Court Building,
Richmond, Va. 23219

BLANK, ROME, COMISKY & MCCAULEY,
Four Penn Center Plaza,
Philadelphia, Pa. 19103
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1802.

AMERICAN MOTORS SALES CORPORATION
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA, ET AL.
Respondents.

BRIEF FOR RESPONDENTS, VIRGINIA DIVISION OF MOTOR VEHICLES AND VERN L. HILL, IN OPPOSITION.

Respondents, the Division of Motor Vehicles of the Commonwealth of Virginia and Vern L. Hill, Commissioner of the Division of Motor Vehicles ("Virginia"), respectfully request that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fourth Circuit is reported at 592 F. 2d 219 (4th Cir. 1979). The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing *en banc* was

issued March 7, 1979, and is reproduced in the appendix to the Petition for Writ of Certiorari ("App") at 32. The opinion of the United States District Court for the Eastern District of Virginia is reported at 445 F. Supp. 902 (E. D. Va. 1978).

JURISDICTION.

Jurisdiction has been invoked pursuant to 28 U. S. C. § 1254(1) (1966).

QUESTION PRESENTED.

Whether VA. CODE § 46.1-547(d) [1] (Cum. Supp. 1978), which prescribes an administrative procedure regulating intrabrand competition in the establishment of additional dealerships for a particular line-make of motor vehicles in a given trade area within the state, violates the Commerce Clause of the United States Constitution.[2]

---

1. VA. CODE § 46.1-547(d) (Cum. Supp. 1978) provides:

> It is unlawful for any manufacturer, factory branch, distributor or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:
>
> . . . (d) to grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by dealer or dealers in that line-make unless the franchisor has first advised, in writing, such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within 30 days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all the dealerships in that line-make in the trade area; provided, further, that a reopening of a franchise in a trade area that has not been in operation for more than one year, shall be deemed the establishment of a new franchise subject to the terms of this subsection . . . .

2. U. S. CONST., art. I, § 8 provides in pertinent part:

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . .

STATEMENT OF THE CASE.

American Motors Sales Corporation ("AMSC"), a Delaware corporation, with its principal place of business in Michigan, and Early AMC, Inc. ("Early") [3] brought suit in the District Court challenging the constitutionality of VA. CODE § 46.1-547(d) (Cum. Supp. 1978) ("statute").[4]

The challenged statute is directed at the placement by motor vehicle manufacturers or distributors of additional dealerships for a given line-make of motor vehicles in a trade area already served by existing franchise dealers in the same line-make. When a manufacturer or distributor proposes to add additional dealers in a particular trade area, the statute affords existing dealers in that line-make in the trade area prior notice of the manufacturer's or distributor's plans. The statute provides an opportunity for a hearing before the Commissioner of Motor Vehicles of Virginia ("Commissioner") or his designee prior to the grant of additional franchises. The Commissioner is authorized to deny the grant of additional franchises only if, on the basis of the hearing record, he determines that there is reasonable evidence that with the addition of another franchise "the market will not support all the dealerships in that line-make in the trade area." *Id.*

Hearings conducted under the statute are subject to the procedural guarantees established by the Virginia Administrative Process Act, VA. CODE tit. 9, ch. 1.1:1, and the Virginia Motor Vehicle Dealer Licensing Act, VA. CODE § 46.1-550.1. Under the Administrative Process Act, the

3. Early is not a party to the Petition since it was granted a Jeep franchise by AMSC on June 5, 1978.

4. P. D. Waugh & Co. and the Virginia Dealer Association ("VADA") intervened in the District Court on behalf of defendants and participated as a party before the Court of Appeals. Although VADA continues to defend the constitutionality of the statute, P. D. Waugh, having sold its automobile franchise on April 27, 1978, is not a party to the Petition.

burden of persuasion is on a protesting party. VA. CODE § 9-6.14:12.C. All sides have the right to counsel and the right to cross-examine. *Ibid.* Decisions are required to be made "with dispatch." *Ibid.* Decisions of the Commissioner are subject to state judicial review. VA. CODE §§ 9-6.14:6 & 46.1-550.1.

In 1975, AMSC notified P. D. Waugh & Co. ("Waugh"), the sole Jeep dealership in the Orange, Virginia market area, that it intended to grant a Jeep franchise to Early, a potential competitor of Waugh in the sale of Jeeps in the Orange market. Early's Jeep franchise would have been an "additional franchise" within the meaning of the statute.

Pursuant to the statute, Waugh notified the Commissioner and requested a hearing to determine whether the market would support both dealerships.

A hearing was held before a hearing officer designated by the Commissioner. The hearing included testimony on the relevant geographic and product markets. All parties had an opportunity to examine and cross-examine witnesses. The hearing examiner determined that the trade area could support the two dealerships. The Commissioner, however, after a review of the record, rejected the hearing officer's conclusion and pursuant to the statute prohibited AMSC from granting Early an additional franchise in the trade area. Neither AMSC nor Early sought review of the Commissioner's decision in state court as provided by the statute and the Virginia Administrative Process Act.

On November 5, 1976, AMSC filed a complaint in the District Court against Virginia seeking a permanent injunction against the enforcement of the statute. The complaint challenged the statute under the Supremacy Clause, the Due Process and Equal Protection Clauses of the

Fourteenth Amendment, and the Commerce Clause of the United States Constitution. On cross motions for summary judgment, the District Court held that the prevention of destructive competition was not a legitimate local purpose under the Commerce Clause and that the state could prevent unfair trade practices involving the establishment of additional dealerships by imposing less restrictive burdens on interstate commerce.[5]

The Court of Appeals reversed on the basis of this Court's holdings in *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 99 S. Ct. 403 (1978), and *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117 (1978).[6]

5. Accordingly, the District Court did not consider other grounds for AMSC's challenge to the statute.

6. Both decisions were rendered subsequent to the decision of the District Court.

REASONS FOR DENYING THE WRIT.

A. The Court of Appeals Gave Full Consideration to the Issues and Decided Them Correctly Under This Court's Recent Decisions.

AMSC's challenge to the constitutionality of the statute was correctly tested by the Court of Appeals under the standards enunciated by this Court in *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U. S. 366, 371-72 (1976), and *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).[7]

Pursuant to the standards enunciated by this Court, the Court of Appeals found that:

1. The statute promoted a legitimate local purpose;
2. The statute treated interstate and intrastate commerce evenhandedly; and
3. The burden imposed on interstate commerce was not excessive when balanced against the state's interest.

1. Legitimate Local Purpose.

In determining that the statute promoted a legitimate local purpose, the Court of Appeals was guided by this

7. The standard applied by the Court of Appeals for determining the validity of the statute under the Commerce Clause was stated as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. 592 F. 2d at 222; App. at 25, citing 397 U. S. at 142.

Court's decision in *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 99 S. Ct. 403 (1978).[8] The Court of Appeals stated:

> The recent decision in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 99 S. Ct. 403 (1978) simplifies our resolution of the first question. There, the Court considered the validity of a California statute similar in many respects to the Virginia statute and the statutes adopted by 15 other states. See 99 S. Ct. at 408 n. 7. Noting the "disparity in bargaining power between automobile manufacturers and their dealers," the Court observed that the franchise regulation "protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market area of its existing franchisees, where the effect of such intra-brand competition would be injurious to the existing franchisees and to the public interest." 99 S. Ct. at 407-08. The Court identified the purpose of such laws as "the promotion of fair dealing and the protection of small business." 99 S. Ct. at 408 n. 7. It then held that the state legislature "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights

---

8. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 99 S. Ct. 403 (1978) involved a challenge to the California Automobile Franchise Act, CAL. VEH. CODE ANN. §§ 3062-63 (West Supp. 1978), under the Due Process Clause of the United States Constitution and the Sherman Act, 15 U. S. C. § 1 (1973). The Court observed that:

> The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 states to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers. 99 S. Ct. at 407. (citations omitted)

The statute challenged in this petition was among the statutes noted by the Court as being similar to the California statute challenged in *Fox*. *See*, 99 S. Ct. at 908 n. 7.

of their franchisees where necessary to prevent unfair or oppressive trade practices." 99 S. Ct. at 411.

The Virginia statute serves the same public interest identified by the Court in *Orrin W. Fox Co.* 592 F. 2d at 222; App. 25-26.

2. Evenhandedness.

In determining that the statute treated interstate and intrastate competition evenhandedly, the Court of Appeals found that the statute made no distinction between the manufacturers that produce automobiles within the state and those that do not. 592 F. 2d at 223; App. 26. Accordingly, the Court held that the statute did not discriminate against interstate commerce under the standards set forth in *Breard v. Alexandria*, 341 U. S. 622, 633-41 (1951), and *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U. S. 329, 336-37 (1951). 592 F. 2d at 223; App. 27. The statute was held by the Court of Appeals to regulate interstate and intrastate commerce evenhandedly. The Court of Appeals further distinguished the two cases upon which petitioner places major reliance (Pet. at 9-12), *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U. S. 525 (1949), and *Buck v. Kuykendall*, 267 U. S. 307 (1925), on the grounds that the statute regulated interstate and intrastate commerce evenhandedly and furthered a legitimate local interest. 592 F. 2d at 223 n. 5; App. 27.

3. No Unconstitutional Burden.

The Court of Appeals determined that the burden imposed by the statute on interstate commerce was not excessive when balanced against the state's interest. In reaching this conclusion, the Court of Appeals relied on this Court's opinion in *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117 (1978). The Court of Appeals rejected petitioner's argument that the statute was an unconstitutional obstruction of interstate commerce, stating that:

"The Supreme Court rejected essentially the same argument in *Exxon Corp. v. Governor of Maryland.*" (citation omitted). 592 F. 2d at 223; App. 27. The Court of Appeals declared that:

> Tested by the principles explained in *Exxon*, we conclude that the Virginia statute imposes no unconstitutional burden on interstate commerce. The public in the Orange market area may buy as many Jeeps as Waugh can sell. If Waugh does not persuade potential purchasers to buy Jeeps, they can buy competitive vehicles. Conversely, American [AMSC] and its competitors can supply the market with all the four-wheel drive vehicles that it will absorb. The statute may affect the structure of the retail market by shifting business from one out-of-state manufacturer to another. But, when a statute is otherwise valid, the commerce clause does not insulate this aspect of trade from state regulation. 592 F. 2d at 223; App. 28. (citation omitted).

In further support of the constitutionality of the statute, the Court of Appeals relied on this Court's analysis of a similar statute in *Fox*[9] and on an examination of the legislative history of the federal Dealers' Day in Court Act, 15 U. S. C. §§ 1221-1225 (1963). 592 F. 2d at 224; App. 29. *See also,* H. R. REP. No. 2850, 84th Cong., 2d Sess. (1956), reprinted in [1956] U. S. CODE CONG. & AD. NEWS 4596, 4603-04. *Cf. Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977).

Petitioner has failed to demonstrate any reason for this Court to reexamine the principles it has recently set forth in *Exxon* and *Fox* and which were properly applied by the Court of Appeals after a full consideration of the issues.

---

9. *See* note 8 *supra.*

B. Petitioners Have Not Presented Any Reasons to Warrant Reexamination of the Principles Set Forth by This Court.

Petitioner attempts to raise this case to a level warranting review by arguing that the decision below presents a constitutional question of great importance which has not been, but should be settled by this Court. Petitioner attempts to create a conflict among state court decisions considering the constitutionality of statutes similar to the Virginia statute by citing *Gen. GMC Trucks, Inc. v. Gen. Motors Corp.*, 239 Ga. 373, 237 S. E. 2d 194, 196-198 (1977) *cert. denied*, 434 U. S. 996 (1977), and *Tober Foreign Motors v. Reiter Oldsmobile, Mass.*, 381 N. E. 2d 908 (1978). Pet. 8.

Petitioner, however, fails to acknowledge that *General Motors* was decided on June 23, 1977, prior to the opinions of this Court in *Fox* and *Exxon*. It must be assumed that the Supreme Court of Georgia, if the matter were presently before it, would decide the case consistently with this Court's recent decisions. Petitioners cannot create a conflict among state courts by assuming that the state courts would not follow this Court's interpretations of the United States Constitution.

Any assumption that this Court's decisions would not be followed is rebutted by recent state court decisions rejecting similar challenges under *Exxon* and *Fox*. *See, e.g., Chrysler Corp. v. New Motor Vehicle Bd.*, 153 Cal. Rptr. 135, 139-141 (1979) (applying *Fox* and *Exxon* to uphold the constitutionality of a statute similar to the Virginia statute); *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*, — Mass. — , 381 N. E. 2d 908, 913-15 (1978) (applying *Exxon* to hold a Massachusetts statute similar to the Virginia statute constitutional under the Commerce Clause). *Cf. Midcal Aluminum, Inc. v. Rice,*

153 Cal. Rptr. 757, 759 (1979). Thus, no conflict, real or assumed, exists requiring resolution by this Court.

CONCLUSION.

For the reasons stated, the Petition for Writ of Certiorari of the Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

JOHN HARDIN YOUNG,
Four Penn Center Plaza,
Philadelphia, Pa. 19103
Counsel for Respondents, Commonwealth of Virginia and Vern L. Hill.

MARSHALL COLEMAN,
Attorney General of Virginia,
WALTER A. MCFARLAND,
Deputy Attorney General,
A. R. WOODROOF,
Assistant Attorney General,
Supreme Court Building,
Richmond, Virginia 23219

BLANK, ROME, COMISKY & MCCAULEY,
Four Penn Center Plaza,
Philadelphia, Pa. 19103

Of Counsel.

July 2, 1979

CERTIFICATE OF SERVICE.

I hereby certify, as a member of the Bar of the Supreme Court of the United States, that on this second day of July, 1979, three copies of the Brief for Respondents, Virginia Division of Motor Vehicles and Vern L. Hill, In Opposition were mailed, first class postage prepaid, to John F. Kay, Jr., Esquire, Mays, Valentine, Davenport & Moore, Post Office Box 1122, Richmond, Virginia 23208, Counsel for petitioner and to David F. Peters, Esquire, Hunton & Williams, Post Office Box 1535, Richmond, Virginia 23212, counsel for respondent Virginia Automobile Dealers Association.

JOHN HARDIN YOUNG,
Four Penn Center Plaza,
Philadelphia, Pa. 19103

Counsel for Respondents,
Commonwealth of Virginia
and Vern L. Hill.

Supreme Court, U. S.
FILED
JUN 29 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1802

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

AND

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

AND

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE VIRGINIA AUTOMOBILE DEALERS ASSOCIATION IN OPPOSITION

DAVID F. PETERS
Hunton & Williams
P. O. Box 1535
Richmond, Virginia 23212
Counsel for Respondent, Virginia Automobile Dealers Association

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

In The

Supreme Court of the United States

October Term, 1978

No. 78-1802

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,
and
VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,
and
VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE VIRGINIA AUTOMOBILE DEALERS ASSOCIATION IN OPPOSITION

OPINION BELOW

The unanimous opinon of the Court of Appeals for the Fourth Circuit is reported at 592 F.2d 219 (4th Cir. 1979),

and is reproduced in the Appendix to the petition beginning at App. 21. The opinion of the United States District Court for the Eastern District of Virginia, which the Court of Appeals reversed, is reported at 445 F. Supp. 902 (E.D. Va. 1978), and is reproduced in the Appendix to the petition beginning at App. 2.

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1979. Following the denial by that court on March 7, 1979, of a petition for rehearing *en banc*, a petition to this Court for a writ of certiorari was filed on June 1, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Virginia Code § 46.1-547(d), which prescribes an administrative procedure to avoid the establishment of more dealerships for a given line-make in a trade area than the particular market can support, violates the Commerce Clause of the United States.

STATUTE INVOLVED

Virginia Code § 46.1-547(d) provides in relevant part:

> It is unlawful for any manufacturer, factory branch, distributor or distributor branch, or any field representative, officer, agent or any representative whatsoever of any of them:
>
> * * *
>
> (d) To grant an additional franchise for a particu-

lar line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor has first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; provided, further, that a reopening of a franchise in a trade area that has not been in operation for more than one year shall be deemd the establishment of a new franchise subject to the terms of this subsection.

STATEMENT OF THE CASE

This case involves a constitutional challenge by American Motor Sales Corporation ("AMSC") to Virginia Code § 46.1-547(d). That statute addresses the placement by motor vehicle manufacturers or distributors of additional dealerships for a given line-make of a motor vehicle in a trade area already served by existing franchised dealers in the same line-make. When a manufacturer or distributor proposes to add additional dealers in a particular trade area, the statute requires the manufacturer or distributor to give notice of its plan to existing dealers in that line-make in the affected trade area. The statute provides an opportunity for a hearing on the matter before the Virginia Commissioner of Motor Vehicles prior to the grant of the additional franchise. The Commissioner is authorized to deny the grant of the additional franchise only if, on the basis of the hearing record, he determines that there is reasonable

evidence that with the addition of another franchise "the market will not support all of the dealerships in that line-make in the trade area."

Hearings conducted under the statute are subject to the procedural guarantees prescribed by Virginia Code § 46.1-550.1 and the Virginia Administrative Process Act, Va. Code Title 9, Ch. 1.1:1. The burden of persuasion is on the protesting party (*i.e.*, the existing franchised dealer) § 9-6.14:12.C.; all sides have the right to counsel and the right to cross-examination, § 9-6.14:12.C.; decisions are required to be made "with dispatch," § 9-6.14:12.C.; and decisions are subject to the right of judicial review, §§ 9-6.14:16 and 46.1-550.1.[1]

The challenge by AMSC to the constitutionality of § 46.1-547(d) was couched in the context of the only proceeding under that statute since its enactment in which the Commissioner had ruled against a manufacturer, determining that the market would not support all of the dealerships in the affected line-make. That proceeding, *P. D. Waugh & Co.* v. *American Motors Sales Corp. and Early AMC, Inc.*, involved a proposal announced by AMSC in October, 1975, to grant a new Jeep franchise in the rural community of Orange, Virginia to Early AMC, Inc. ("Early"), an existing dealer then franchised to sell AMC and Suburu vehicles in the Orange market. (Jt. App. 67).[2] That proposal

---

[1] A Motor Vehicle Dealers' Advisory Board, created by Va. Code § 46.1-550.2, is directed to "consult with and advise" the Commissioner with respect to certain matters, including proceedings under § 46.1-547(d). The Board consists of six members, three of whom are franchised motor vehicle dealers and three of whom are "public" members. The Board is authorized to offer advice to the Commissioner in his deliberations, but it has no decision-making authority and the Commissioner is not bound to follow its advice.

[2] "Jt. App." refers to the Joint Appendix to the briefs filed in the Court of Appeals.

was objected to by P. D. Waugh & Co. ("Waugh") which held an existing franchise from AMSC to sell Jeep vehicles in Orange. The Early and Waugh businesses were located less than two miles from each other. (Jt. App. 102).

At an administrative hearing requested by Waugh on the matter under Virginia Code § 46.1-547(d), Waugh presented detailed evidence that Orange County had just experienced three major plant closings, that it had the highest unemployment rate in the State (14%), and that there were little prospects for economic or population growth in the area. (Jt. App. 96, 133-36, 226, 228). AMSC and Early offered no evidence to counter Waugh's arguments as to the particular economic conditions in the area. Although the hearing officer recommended that the additional franchise be approved, the Commissioner concluded that "there is reasonable evidence that after the grant of the additional franchise, the market will not support all of the dealerships in that line-make in the trade area." (Jt. App. 70). Neither AMSC nor Early sought judicial review of that decision as was their right under Virginia Code § 46.1-550.1.

Thereafter, AMSC and Early filed an action in the United States District Court for the Eastern District of Virginia against the Virginia Division of Motor Vehicles and its Commissioner seeking a declaratory judgment that § 46.1-547(d) is unconstitutional, broadly charging that the statute violates the Supremacy Clause, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Commerce Clause of the United States Constitution. Waugh and the Virginia Automobile Dealers Association intervened in that action as defendants. The case was submitted to the District Court on cross-motions for summary judgment (Jt. App. 3-6), supported by a stipulation of facts (Jt. App. 67-71), affidavits (Jt. App. 7-5), memoranda of law and oral argument.

The District Court held that § 46.1-547(d) violates the Commerce Clause,[3] concluding (1) that under the authority of *Buck* v. *Kuykendall,* 267 U.S. 307 (1925), and *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949), "the preservation of competition is not a legitimate local purpose under the Commerce Clause," and (2) that the protection of automobile dealers against unfair trade practices by manufacturers can be accomplished "with a much lesser burden on interstate commerce." *American Motors Sales Corp.* v. *Division of Motor Vehicles,* 445 F. Supp. 902, 911 (E.D. Va. 1978).

On appeal, the Court of Appeals for the Fourth Circuit reversed, holding on the basis of well established Supreme Court authority, and particularly this Court's recent decisions in *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978), and *New Motor Vehicle Board* v. *Orrin W. Fox Co.,* ..... U.S. ..... (1978), that (1) the Virginia statute serves a legitimate local purpose, (2) the statute regulates evenhandedly, and (3) the statute imposes no excessive burden on interstate commerce when balanced against the State's interest. *American Motors Sales Corp.* v. *Division of Motor Vehicles,* 592 F.2d 219 (4th Cir. 1979).[4]

AMSC has now petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals.

---

[3] The District Court addressed only the Commerce Clause issue and refrained from deciding the other constitutional arguments the plaintiffs had raised.

[4] In the meantime, while the case was on appeal in the Fourth Circuit, the stockholders of P. D. Waugh & Co. sold the business, AMSC terminated the Jeep franchise of the new owner, and Early was granted the franchise to sell Jeeps in the Orange trade area. As a result, neither Early nor Waugh remain as parties to this case.

REASONS FOR DENYING THE WRIT

I. This Court Has Already Resolved The Constitutional Issue Raised By This Case, And Since The Court Of Appeals Correctly Interpreted And Applied This Court's Precedents On The Matter, No Further Review Is Warranted

AMSC contends that the Supreme Court has never before addressed the issue whether a statute similar to Virginia Code § 46.1-547(d) violates the Commerce Clause. AMSC Pet. at 7-8. To the contrary, decisions of this Court have spoken squarely to the arguments AMSC has raised and without exception have upheld statutes similar to § 46.1-547(d) against constitutional attack.

To begin with, that statutes such as § 46.1-547(d) serve a legitimate public purpose sufficient under constitutional analysis is now beyond question. In *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, ... U.S. ....., 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), this Court considered a Due Process attack against a provision of the California Automobile Franchise Act that regulates the grant by manufacturers of additional dealer franchises in trade areas already served by dealers in that line-make. Specifically noting that at least 17 other states, including Virginia, have similar statutes, this Court commented that the purpose of such laws is "the promotion of fair dealing and the protection of small business." 58 L.Ed.2d at 371 n. 7. This Court further observed that:

> [T]he Act protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intra-brand competition would be injurious to the existing franchisees and to the public interest.

58 L.Ed.2d at 371. Concluding that such a purpose is a valid state interest, this Court held that the state legislature "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." 58 L.Ed.2d at 374. Drawing on those statements, the Fourth Circuit considering the parallel Virginia statute in the present case held that the Virginia law likewise serves a legitimate local purpose. 592 F.2d at 223.

Moreover, this Court has on several occasions upheld against Commerce Clause attack state statutes, such as § 46.1-547(d), that regulate who may act as retail sellers of products shipped in interstate commerce. Thus, in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951), this Court rejected a challenge to a Michigan statute that regulated the number of natural gas retailers permitted in a trade area. Noting that the interstate appellant in that case, just as AMSC in this case, was still free to supply its product to the Michigan markets through the existing and licensed retailer in that market, this Court held that the appellant had no constitutional right to increase the number of retailers in that market, saying:

> Although the end result might be prohibition of particular direct sales, to require appellant to secure a certificate of public convenience and necessity before it may enter a municipality already served by a public utility is regulation, not absolute prohibition. There is no intimation that appellant cannot deliver and sell available gas to Consolidated [the existing retailer] for resale to customers who have additional gas requirements. It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certificated utility

> where the public convenience and necessity would not be served by direct sales.

341 U.S. at 336.

More recently, this Court upheld a Maryland statute requiring petroleum producers to divest themselves of ownership and control of gasoline retail stations that compete in that state against independently owned and operated stations. *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). Holding, first, that the state has a "legitimate purpose in controlling the gasoline retail market," 437 U.S. at 125, this Court rejected all Commerce Clause challenges, noting that the statute:

> [D]oes not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.

437 U.S. at 126. Responding to the argument that by precluding from the Maryland market certain petroleum producers that do business exclusively through company-operated stations the statute impermissibly *burdens* interstate commerce, this Court said:

> Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.
>
> The crux of appellants' claim is that, regardless of whether the State has interfered with the movement of

> goods in interstate commerce, it has interfered "with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806. Appellants then claim that the statute "will surely change the market structure by weakening the independent refiners. . . ." We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. See *Breard* v. *Alexandria*, 341 U.S. 622. As indicated by the Court in *Hughes*, the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce .

437 U.S. at 127-28 (footnote omitted).

In considering Virginia Code § 46.1-547(d), the Court of Appeals in this case properly recognized that the effects on commerce produced by that statute are no more burdensome than the effects of the Maryland statute upheld by this Court in *Exxon*. Thus, the Fourth Circuit concluded:

> Tested by the principles explained in *Exxon*, we conclude that the Virginia statute imposes no unconstitutional burden on interstate commerce. The public in the Orange market area may buy as many Jeeps as Waugh can sell. If Waugh does not persuade potential purchasers to buy Jeeps, they can buy competitive vehicles. Conversely, American and its competitors can supply the market with all the four-wheel drive vehicles that it will absorb. The statute may affect the structure of the retail market by shifting business from one out-of-state manufacturer to another. But, when a

> statute is otherwise valid, the commerce clause does not insulate this aspect of trade from state regulation. *Exxon,* 98 S.Ct. at 2215.
>
> The Virginia statute restricts intrabrand competition between Jeep dealers by excluding Early from the Orange market. But that effect alone does not establish a violation of the commerce clause.

592 F.2d at 223.

AMSC contends that the Court of Appeals misapplied *Exxon* by failing to recognize that "the effect of the Virginia statute on interstate commerce is far greater than the effect of the Maryland statute." AMSC Pet. at 13. According to AMSC this "greater effect" results from the fact that the Virginia statute does not simply regulate the structure of local retail markets, as in *Exxon,* but rather prohibits a purely interstate transaction—the grant of a franchise by an out-of-state manufacturer to an in-state dealer. AMSC Pet. at 13.

To suggest that a statute is constitutionally deficient because it addresses the grant of a franchise for the retail sale of motor vehicles rather than the retail sales themselves is but to raise form over substance. Under such a theory, a statute that denied not the grant of the franchise but rather the right of a dealer holding a franchise to resell his vehicles to the public would pass constitutional muster, whereas a statute that denied the grant of the franchise in the first place would not. The end result under both statutes would be the same, sales of the product could not be made through the proposed new dealer, but one statute would be constitutional and the other would not. Nothing in any of this Court's prior decisions, including *Exxon,* suggests such a distinction and the Court of Appeals was right in rejecting the notion.

AMSC also insists that rather than following *Exxon,* the Court of Appeals should have been guided by the language of early decisions of this Court in *Buck* v. *Kuykendall,* 267 U.S. 307 (1925), and *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949). AMSC Pet. at 9-12. As the Court of Appeals recognized, however, the language of those cases is more appropriately applied in contexts of *discrimination* against interstate commerce, 592 F.2d at 223 and n. 5, as has been made clear by numerous decisions of the Supreme Court. *See, e.g., Breard* v. *Alexandria,* 341 U.S. 622, 637 (1951) ("in *Hood,* it was the discrimination against out-of-state dealers that invalidated the order"); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U.S. 179, 188 (1950) ("The vice in the regulation invalidated in *Hood* was solely that . . . the regulation discriminated against interstate commerce"); *Stephenson* v. *Binford,* 287 U.S. 251, 266-67 (1932) (distinguishing *Buck* as dealing with a statute "affecting interstate commerce and with discriminations relating thereto"); *Morris* v. *Duby,* 274 U.S. 135, 143 (1927) (citing *Buck* for the rule that "the State may not discriminate against interstate commerce").[5] Not even AMSC has suggested that Virginia Code § 46.1-547(d) discriminates against interstate commerce.

After *Exxon,* there is little this Court could add to a further understanding of the Commerce Clause by undertaking a review of the Court of Appeals decision in the present case. Under *Exxon,* AMSC can have no Commerce

---

[5] See also *Tober Foreign Motors, Inc.* v. *Reiter Oldsmobile, Inc.,* 381 N.E. 2d 908 (Mass. 1978), upholding the Massachusetts counterpart to Va. Code § 46.1-547(d), and distinguishing *Buck* on the ground that the statute involved there constricted physical channels of commerce itself—the interstate passage of common carriers—obstructing " 'facilties for conducting interstate commerce,' " 381 N.E. 2d at 915.

Clause complaint against the Virginia statute as that law does nothing to prohibit the flow of AMSC products, or any other manufacturer's product, into the Virginia markets. The fact that AMSC is not free to jam the Virginia markets with more dealerships for its products than the markets can support has no constitutional significance under *Exxon*. The Court of Appeals decision was fully consistent with *Exxon* and the other relevant decisions of this Court, and there is nothing in the AMSC petition or the record of this case to suggest that a rethinking of constitutional principles established by those decisions is now in order.

II. There Has Been No Conflict In Decisions Involving Statutes Similar To Virginia Code § 46.1-547(d) Since The Supreme Court's Decisions In EXXON And ORRIN FOX

AMSC suggests that Supreme Court review of this case is necessary to resolve a conflict in decisions by state courts as to the constitutionality of statutes similar to Virginia Code § 46.1-547(d). AMSC Pet. at 8. The only case cited by AMSC as holding against the constitutionality of such statutes is a decision by the Georgia Supreme Court in *General GMC Truck, Inc.* v. *General Motors Corp.*, 237 S.E.2d 194 (Ga. 1977), *cert. denied*, 434 U.S. 996 (1977).[6]

The Georgia case was decided in 1977, *before* this Court's decisions in *Exxon Corp.* v. *Governor of Maryland, supra,*

---

[6] The Georgia statute was significantly different from the Virginia statute. By its terms, the Georgia statute addressed not the public interest question of what the market can support (as the Virginia statute does), but rather whether the addition of another dealership would cause "a reduction in the business of the existing dealer." Ga. Code Ann. § 84-6610(f) (10) (Supp. 1976). The Virginia statute does not protect an existing dealer's sales percentage in the market. The Georgia statute also placed the burden of proof on the manufacturer, whereas the burden under the Virginia statute is on the protesting dealer. See discussion *supra* p. 4.

and *New Motor Vehicle Board* v. *Orrin W. Fox Co., supra.* Significantly, in every reported case since those decisions by the Supreme Court, the courts have upheld the constitutionality of statutes similar to the Virginia law. Thus, in addition to the decision by the Court of Appeals below in the present case,[7] the Massachusetts Supreme Judicial Court has rejected all constitutional challenges (including a Commerce Clause attack) against a similar statute of that state, citing this Court's decision in *Exxon. Tober Foreign Motors, Inc.* v. *Reiter Oldsmobile, Inc.,* 381 N.E.2d 908, 915 (Mass. 1978). Similarly in *Chrysler Corp.* v. *New Motor Vehicle Board,* 153 Cal. Rptr. 135 (Cal. Ct. App. 1979), a California Court of Appeals upheld the counterpart California statute, specifically rejecting the analysis of the District Court in the present case as being in error under the principles of *Orrin Fox* and *Exxon.*

The point is that with *Orrin Fox* and *Exxon,* the courts of the land now have clear and ample guidance for the determination of the constitutionality of statutes such as Virginia Code § 46.1-547(d). There has been no conflict in the cases since those decisions and there is not likely to be.

---

[7] Neither *Exxon* nor *Orrin Fox* had been decided at the time of the District Court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID F. PETERS
P. O. Box 1535
Richmond, Virginia 23212

Counsel for Respondent, Virginia Automobile Dealers Association

HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212

Of Counsel

June 29, 1979

Supreme Court, U. S.
FILED
JUL 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1802

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
P. O. Box 1122
Richmond, Virginia 23208
Counsel for Petitioner

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1802

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

REPLY BRIEF OF PETITIONER

Petitioner, American Motors Sales Corporation ("AMSC"), submits this brief in reply to the briefs in opposition of respondents.

Respondents Have Incorrectly Stated That This Court Has Already Resolved The Constitutional Issue Raised By This Case.

Respondents rely upon *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, ... U.S. ....., 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978), *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951), and *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), in support of their contention that this Court has already resolved the constitutional issue raised by this case. AMSC submits that those cases do not resolve the issue.

In *Fox*, the only one of the three cases dealing with a statute similar to Va. Code § 46.1-547(d), this Court studiously avoided any reference to or resolution of the Commerce Clause question, which is the only question presented by the instant case.

In *Panhandle*, the requirement of a Michigan statute that Panhandle, a natural gas company, had to obtain a certificate of convenience and necessity from the Michigan Public Service Commission before it could engage in the *retail* sale of natural gas, was upheld because this Court found:

> . . . the sale and distribution of gas to local consumers by one engaged in interstate commerce is "*essentially local*" in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution. [Emphasis added.]

341 U.S. at 333.

Panhandle is clearly distinguishable from the instant case. In the first place, the sale of natural gas is a public service business while the sale of automobiles is not. Second, Consolidated Gas Company, the certificated company which Panhandle sought to by-pass, was a public utility company

which, because of the strict regulations to which such companies are subject, was entitled to protection from competition for the "cream of the volume business" while an automobile dealership is not a public utility entitled to such protection. Third, Panhandle's volume of sales in Michigan would not be affected because the gas it proposed to sell directly to industrial customers would be sold by Panhandle to Consolidated which in turn would sell it to the customers. Here, AMSC's sales in Virginia are affected because there is no assurance that an existing dealer would make sales to the same customers that Early, a new dealership, would.[1] Fourth, *Panhandle,* like *Exxon,* involved proposed sales to ultimate users while the instant case involves proposed sales by AMSC to a distributor. Va. Code § 46.1-547.2 prohibits AMSC from selling vehicles directly to the public. While *Panhandle* and *Exxon* might provide some support to the state if that statute were being challenged, they are not applicable here.

It is obvious that this Court considers *direct* sales of gas to industrial customers to be peculiarly local in nature. *See F.P.C.* v. *Trancontinental Gas Corp.*, 365 U.S. 1, 20 (1965), wherein *Panhandle* was cited in support of the rule that "[c]onsuming states may control the end use of gas. . . ."

Finally, in *Exxon,* this Court upheld a Maryland statute that prohibited a producer or refiner of petroleum products from operating any *retail* service station, stating:

> We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a *retail market.* [Emphasis supplied.]

437 U.S. at 127.

[1] Aff. Kessler ¶ 8 (Jt. App. 9.)

Thus, neither *Panhandle* nor *Exxon* deals with restrictions upon the franchising of motor vehicle dealers; rather, they deal with retail sales—an essentially local matter—and are clearly distinguishable in fact and in principle from the instant case.

More important from the standpoint of this petition, the scope of the principles enunciated by this Court in *Exxon* should be clarified. The Fourth Circuit in its opinion below quoted from *Exxon*:

> [The Commerce Clause] protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. 98 S.Ct. at 2215.

592 F.2d at 223. In the context of this case, the effect of the statute on the interstate market can only be measured by its effect on interstate firms. If it prohibits or burdens an interstate transaction between AMSC and a proposed dealer, it necessarily burdens the interstate market. However, the Fourth Circuit, after quoting the above holding of this Court, concluded:

> Tested by the principles explained in *Exxon,* we conclude that the Virginia statute imposes no unconstitutional burden on interstate commerce. The public in the Orange market area may buy as many Jeeps as Waugh can sell. If Waugh does not pursuade potential purchasers to buy Jeeps, they can buy competitive vehicles. Conversely, American and its competitors can supply the market with all the four-wheel drive vehicles that it will absorb. The statute may affect the structure of the *retail* market by shifting business from one out-of-state manufacturer to another. But, when a statute is otherwise valid, the commerce clause does not insulate this aspect of trade from state regulation. *Exxon,* 98 S.Ct. at 2215. [Emphasis supplied.]

592 F.2d at 223.

If such analysis of *Exxon* is correct, then the protection of the free flow of commerce among the states afforded by the Commerce Clause has been substantially eroded. Barriers which have been dismantled by prior decisions can again be erected. As long as a particular *type* of product is available to the public from *any* out-of-state manufacturer, and as long as a particular manufacturer has at least one outlet in a "market area", then, under the analysis of the Fourth Circuit, there would be no violation of the Commerce Clause. For example, a statute making it unlawful for any manufacturer of motor vehicles (or any other product) to grant an additional franchise in a trade area already served by a dealer would pass Commerce Clause muster. Paraphrasing the language of the Fourth Circuit, the public could buy as many vehicles of the line-make as the existing dealer could sell; if the existing dealer could not persuade purchasers to buy the line-make handled by him, they could buy competitive vehicles; and the manufacturer and its competitors could presumably supply the market through existing dealers with all the vehicles it could absorb. Thus, following the reasoning of the Fourth Circuit, such a statute would affect only the structure of that retail market.

AMSC submits that Va. Code § 46.1-547(d) directly and primarily affects the interstate market by placing unconstitutional burdens upon it and that any effects upon the retail market are indirect and secondary. AMSC further submits that this Court did not intend that its holding in *Exxon* should be applied in the manner in which the Fourth Circuit applied it. Such an application is directly in conflict with the principles enunciated in the decisions of this Court in *Buck* v. *Kuykendall*, 267 U.S. 307 (1925), and *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949).

In *Hood*, a statute which the District Court in the present case described as "almost identical in effect" to Va. Code

§ 46.1-547(d) was invalidated under the Commerce Clause. There, the State of New York, like the Fourth Circuit, reasoned that:

> . . . denial of the license for a new plant does not restrict or obstruct interstate commerce, because petitioner has been licensed at its other plants without condition or limitation as to the quantities it may purchase. . . . [B]y increased efficiency or enlarged capacity at its other plants, petitioner might sufficiently increase its supply through those facilities.

336 U.S. at 339.

In rejecting the above argument, this Court stated:

> But the argument also asks us to assume that the Commissioner's order will not operate in the way he found that it would as a reason for making it. He found that petitioner, at its new plant, would divert milk from the plants of some other large handlers in the vicinity, which plants "can handle more milk." This competition he did not approve. He also found it would tend to deprive local markets of needed supplies during the short season. In the face of affirmative findings that the proposed plant would increase petitioner's supply, we can hardly be asked to assume that denial of the license will not deny petitioner access to such added supplies. *While the state power is applied in this case to limit expansion by a handler of milk who already has been allowed some purchasing facilities, the argument for doing so, if sustained, would be equally effective to exclude an entirely new foreign handler from coming into the state to purchase.* [Emphasis supplied.][2]

[2] The logical extension of the Fourth Circuit's application of the holding in *Exxon* that "[the Commerce Clause] protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations" would be that the State of Virginia could totally prohibit AMSC from establishing *any* Jeep vehicle dealerships in Virginia so long as some other manufacturer was supplying the market with four-wheel drive vehicles.

Id. at 540.

The reasoning of this Court in *Hood* is equally compelling in the present case, where there is evidence that the establishment of a new dealership in the Orange, Virginia market area would increase the total number of Jeep sales in that area.[3]

Accordingly, the petition for certiorari should be granted so that this Court can clarify the scope of its holding in *Exxon* that "[the Commerce Clause] protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations," and settle the important and complex question of constitutional law presented by the instant case.

CONCLUSION

For the reasons stated herein and in the petition, a writ of ceritorari should issue to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,
JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
P. O. Box 1122
Richmond, Virginia 23208
Counsel for Petitioner

July 13, 1979

[3] See Aff. Kessler ¶ 8. (Jt. App. 9). Neither the Commissioner's findings of fact nor his conclusion that there is "reasonable evidence" that the market area "will not support all the [Jeep] dealerships in the trade area" if the additional franchise were granted refutes such evidence. Thus the Commissioner did not find that AMSC could make such additional sales through Waugh, the existing dealership.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1979, three copies of the Reply Memorandum of Petition were mailed, first class postage prepaid, to the Honorable J. Marshall Coleman, Attorney General of the Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219, counsel for respondents Division of Motor Vehicles of the Commonwealth of Virginia and Vern L. Hill, Commissioner of the Division of Motor Vehicles of the Commonwealth of Virginia, and to David F. Peters, Esquire, and Dale A. Oesterle, Esquire, Hunton & Williams, P. O. Box 1535, Richmond, Virginia 23212, counsel for respondent Virginia Automobile Dealers Association. I further certify that all parties required to be served have been served.

Respectfully submitted,

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
P. O. Box 1122
Richmond, Virginia 23208
Counsel for Petitioner